

STATE OF MICHIGAN
COURT OF APPEALS

EXCELL CONSTRUCTION, INC.,

Plaintiff-Appellant,

V

CAPITAL CONSULTANTS, INC.,

Defendant-Appellee.

UNPUBLISHED

June 19, 2003

No. 239220

Ingham Circuit Court

LC No. 00-92453-NZ-C30

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(7) and denial of plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

In June 1993, defendant entered into a contract with the State of Michigan concerning design work for "Revitalization of the Michigan Animal Agriculture Swine Teaching and Research Center" (the project) at Michigan State University (MSU). In March 1994, defendant contracted with MSU to provide construction administration and design implementation services for the project.

In reliance on defendant's drawings and specifications, plaintiff contracted with MSU to act as the general contractor on the project. Plaintiff claims that after construction began, it realized that defendant's drawings and specifications were incomplete, inaccurate, and defective. As a result, plaintiff claims that it suffered delays in construction and additional, unexpected costs.

The contract between MSU and plaintiff provided that MSU could terminate plaintiff's employment upon certification by defendant that sufficient cause, as defined in the contract, existed for termination. Eventually, MSU recommended to defendant that plaintiff's employment be terminated. Defendant, allegedly without investigating whether sufficient cause for termination existed, certified plaintiff's termination. On July 24, 1997, MSU terminated plaintiff's employment and refused to make requested payments to plaintiff.

In December 1997, plaintiff sued MSU in the Court of Claims, alleging breach of contract, unjust enrichment, and misrepresentation/detrimental reliance. MSU filed a counter-claim alleging that plaintiff had breached the contract and asserted in defense of plaintiff's complaint that its decision to withhold payment was justified because plaintiff had breached the contract and MSU had sufficient cause to terminate plaintiff's employment. The parties filed cross-motions for summary disposition, and the Court of Claims granted MSU's motion, concluding that MSU had not breached the contract because sufficient cause existed to terminate plaintiff's employment. Plaintiff appealed that decision to this Court.¹

In March 2000, plaintiff filed the instant action against defendant, claiming that defendant committed professional malpractice (Count I) by providing defective design drawings, making multiple changes to the drawings, and "failing to make an affirmative undertaking of the facts and substance of the recommendation by MSU to terminate [plaintiff]." In Count II, plaintiff asserted a claim for gross negligence, alleging facts virtually identical to those alleged in Count I. In Count III, plaintiff claimed that defendant had breached its contract with MSU by, among other things, "failing to make an affirmative undertaking of the facts and substance of the recommendation by MSU to terminate [plaintiff]" and that plaintiff was a third-party beneficiary of the contract. Count IV of plaintiff's complaint alleged that defendant breached its duties under MCL 339.2008(3) by providing incomplete drawings and delegating to plaintiff, a non-licensed entity, certain design responsibilities. Finally, in Count V of its complaint, plaintiff alleged that defendant tortiously interfered with plaintiff's contract with MSU by failing to meet its own contractual obligations in a timely manner and approving MSU's termination of plaintiff without an independent review of plaintiff's performance.

In June 2000, plaintiff filed a motion for summary disposition concerning the "liability portion of its malpractice claims"² pursuant to MCR 2.116(C)(10). Plaintiff argued that defendant breached the professional standard of care by certifying MSU's termination of plaintiff despite defendant's contributions to delays in construction. Plaintiff also argued that defendant caused plaintiff's inability to adhere to the construction schedule.

Defendant responded to plaintiff's motion for summary disposition and also filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendant argued (1) that plaintiff's claim for professional malpractice was barred by the two-year statute of limitations because plaintiff's complaint was filed more than two years after MSU terminated plaintiff; (2) that collateral estoppel barred plaintiff's claim for gross negligence; (3) that plaintiff

¹ This Court has recently issued an opinion in plaintiff's suit against MSU affirming the trial court's decision on the breach of contract issue and stating that MSU had cause to terminate plaintiff's employment. See *Excell Construction, Inc v Michigan State University Board of Trustees*, unpublished opinion per curiam of the Court of Appeals, released 1/14/03 (Docket No. 228310).

² Plaintiff later stated in its motion that it was requesting summary disposition "on the liability portion of its negligence claims." Thus, it is not entirely clear whether plaintiff's request for summary disposition was limited to Count I of its complaint or whether plaintiff also requested summary disposition on Count II.

was merely an incidental beneficiary, rather than a third-party beneficiary, of defendant's contract with MSU; (4) that plaintiff's allegations of breach of defendant's duties under MCL 339.2008(3) were unsubstantiated; and (5) that because plaintiff was terminated for cause, plaintiff could not demonstrate that defendant had intentionally interfered with plaintiff's contract with MSU.

Plaintiff opposed defendant's motion. In particular, plaintiff claimed that the statute of limitations did not bar its claim for professional negligence because its claim accrued on September 28, 1999, the date that plaintiff allegedly learned through the deposition testimony of Mathew Jarvi, the engineer who certified plaintiff's termination, that defendant failed to conduct an independent investigation into MSU's assertion that sufficient cause existed to terminate plaintiff's employment. Plaintiff also disputed the application of *res judicata*³ to its gross negligence claim.

The trial court denied plaintiff's motion for summary disposition and granted defendant's motion. The trial court stated that a two-year statute of limitations applied to plaintiff's malpractice claim, rather than the six-year statute of limitations provided in MCL 600.5839 for architectural malpractice. Although the trial court did not expressly state that the discovery rule did not apply to plaintiff's claim, it stated that plaintiff "knew or should have known that [it] filed a claim back when [it] filed [its] pleadings in the Court of Claims action." The trial court also found that plaintiff's gross negligence claim was barred by collateral estoppel; that plaintiff was not a third-party beneficiary of defendant's contract with MSU; that plaintiff had not properly alleged a breach of MCL 339.2008(3); and that plaintiff's claim for tortious interference was barred because the claim was inconsistent with the obligations the contract imposed on defendant and the findings made in the Court of Claims action.

Plaintiff moved for reconsideration, which the trial court denied after hearing oral argument on plaintiff's motion. In its ruling, the trial court stated that an exception to the mutuality requirement of collateral estoppel applies in this case based on a principal/agent or master/servant relationship that existed between defendant and MSU. Additionally, the trial court stated that the main issues in this case had already been determined because the court of claims found, independent of defendant's letter certifying plaintiff's termination, that plaintiff had breached the contract.

Plaintiff now appeals the trial court's grant of summary disposition in defendant's favor regarding plaintiff's claim in counts I and II of its complaint that defendant failed to independently investigate whether sufficient cause for plaintiff's termination existed. Plaintiff also appeals the trial court's denial of its motion for summary disposition regarding counts I, II, and V of its complaint.

³ Although defendant argued that collateral estoppel applied to bar plaintiff's claims, plaintiff argued in response that *res judicata* did not bar its claims and did not address collateral estoppel in its responsive brief.

II. Standard of Review

This Court reviews de novo the trial court's decision concerning a motion for summary disposition. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 528; 660 NW2d 384 (2003). The application of the statute of limitations presents an issue of law for the Court when factual disputes do not exist concerning when the plaintiff should have discovered its claim. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997). Whether collateral estoppel bars plaintiff's claims also presents a question of law. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). Summary disposition based on collateral estoppel or the statute of limitations is decided pursuant to MCR 2.116(C)(7). *Minicuci, supra* at 36 n 5; MCR 2.116(C)(7).

Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when, except as to the amount of damages, no genuine issues of material fact exist. *Old Kent Bank, supra* at 528.

III. Analysis

First, plaintiff argues that the trial court erroneously concluded that the statute of limitations barred its claim that defendant committed professional malpractice by failing to independently investigate whether sufficient cause existed to terminate plaintiff's employment. We disagree.

MCL 600.5838(1) provides that the statute of limitations for professional malpractice claims, other than medical malpractice claims, accrues at the time the professional "discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." However, a plaintiff may also file a claim within six months of when the plaintiff discovers or should have discovered the claim. MCL 600.5838(2). "The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff." *Id.*

Plaintiff argues that its claim is not time-barred because a factual dispute exists concerning when plaintiff discovered or should have discovered its claim. We disagree. To determine when the "discovery rule" period begins to run, the Court applies the "possible cause of action" standard. *Solowy, supra* at 221-222, citing *Moll v Abbott Laboratories*, 444 Mich 1, 506 NW2d 816 (1993). "Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Id.* at 222, quoting *Moll, supra* at 24. "The 'possible cause of action' standard does not require that the plaintiff know that the injury . . . was in fact or even likely caused by the defendant['s] . . . alleged omissions." *Solowy, supra* at 224.

In the instant case, plaintiff has failed to meet its burden under MCR 600.5838(2). First, although plaintiff argues that its claim accrued when it took Mathew Jarvi's deposition, Jarvi's testimony, the only evidence on which plaintiff relies, merely states what steps defendant took after MSU recommended termination. His testimony does not support plaintiff's burden of

proving that plaintiff “neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable” to plaintiff’s claim. MCL 600.5838(2); *Solowy, supra* at 231.⁴ Second, because it is undisputed that the contract prohibits MSU from terminating plaintiff without defendant’s certification, plaintiff should have known that defendant was involved with the termination decision. Accordingly, at the time plaintiff was terminated, plaintiff had adequate notice that defendant’s certification was a possible cause of its injury. *Solowy, supra* at 222; *Moll, supra* at 24. Therefore, plaintiff’s claim against defendant accrued at the time of plaintiff’s termination and is time-barred.

Next, plaintiff argues that the trial court erred by concluding that collateral estoppel bars its claims.⁵ In *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340-341; 657 NW2d 759 (2002), this Court summarized the legal principles pertaining to collateral estoppel.

⁴ In finding that the plaintiff failed to meet her burden under MCL 600.5838a(2), the Court in *Solowy, supra* at 231, stated that

[r]ather than coming forward with evidence that she was unaware of a possible cause of action as of [the operative date], . . . the plaintiff focused on the fact that, as of this date, there was a possibility that she did not have a cause of action This fact does . . . does not support plaintiff’s assertion that she could not have been aware of a possible cause of action.

⁵ Plaintiff also states that res judicata does not bar its claims, but the trial court’s decision, as well as defendant’s motion for summary disposition, were based on collateral estoppel, not res judicata. Accordingly, this issue has not been properly preserved, and we decline to review it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We also note that although plaintiff asserts that its “claims” are not barred by the preclusion doctrines, the trial court’s finding was limited to plaintiff’s claim of gross negligence. Additionally, plaintiff states that the “crux” of its appeal is that defendant failed to independently investigate whether sufficient cause for termination existed. Plaintiff does not address any of its other claims in this portion of plaintiff’s employment. See *Excell Construction, Inc v Michigan State University Board of Trustees*, unpublished opinion per curiam of the Court of Appeals, released 1/14/03 (Docket No. 228310).

⁵ Plaintiff later stated in its motion that it was requesting summary disposition “on the liability portion of its negligence claims.” Thus, it is not entirely clear whether plaintiff’s request for summary disposition was limited to Count I of its complaint or whether plaintiff also requested summary disposition on Count II.

⁵ Although defendant argued that collateral estoppel applied to bar plaintiff’s claims, plaintiff argued in response that res judicata did not bar its claims and did not address collateral estoppel in its responsive brief.

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[T]he doctrine of collateral estoppel prevents “relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” This doctrine is strictly applied in that “[t]he issues [in both cases] must be identical, and not merely similar” The previous litigation must have presented a “full and fair” opportunity to litigate the issue presented in the subsequent case. Furthermore, collateral estoppel includes an element of mutuality, requiring the previous litigation of the issue to have had a preclusive effect on the party asserting collateral estoppel as a defense.

In the present action, plaintiff argues that collateral estoppel does not preclude its claims because mutuality of estoppel is absent and because defendant’s breach of its duties to plaintiff was not a subject of the prior litigation.

“[L]ack of mutuality does not always preclude the application of collateral estoppel.” *Lichon v American Universal Ins Co*, 435 Mich 408, 428 n 16; 459 NW2d 288 (1990). Here, defendant asserts that an exception to the mutuality requirement applies because defendant was an agent of MSU. We agree. In *Couch v Schultz*, 176 Mich App 167, 171; 438 NW2d 296 (1989), this Court reiterated that mutuality is not required “where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit.” *Id.*, quoting *DePolo v Greig*, 338 Mich 703, 711; 62 NW2d 441 (1954), citing *Bigelow v Old Dominion Copper Mining & Smelting Co*, 225 US 111, 127-128; 32 S Ct 641; 56 L Ed 1009 (1912). The *Bigelow* exception applies where a special relationship, such as a principal-agent relationship, exists between the defendant in the prior action and the defendant in the subsequent action. *Couch*, *supra* at 170; see also *Braxton v Litchalk*, 55 Mich App 708; 223 NW2d 316 (1974); *Arim v General Motors Corp*, 206 Mich App 178, 194; 520 NW2d 695 (1994). “The injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit” supports nonmutual estoppel in such instances. *Couch*, *supra* at 170, quoting *Bigelow*, *supra*.

Plaintiff argues that the *Bigelow* exception is inapplicable here because the trial court did not conclude that defendant was an agent of MSU and, to the extent that it did reach that

(...continued)

This fact does . . . does not support plaintiff’s assertion that she could not have been aware of a possible cause of action.

⁵ Plaintiff also states that res judicata does not bar its claims, but the trial court’s decision, as well as defendant’s motion for summary disposition, were based on collateral estoppel, not res judicata. Accordingly, this issue has not been properly preserved, and we decline to review it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We also note that although plaintiff asserts that its “claims” are not barred by the preclusion doctrines, the trial court’s finding was limited to plaintiff’s claim of gross negligence. Additionally, plaintiff states that the “crux” of its appeal is that defendant failed to independently investigate whether sufficient cause for termination existed. Plaintiff does not address any of its other claims in this portion of its argument.

conclusion, it erred because defendant owed a duty to plaintiff to independently determine whether plaintiff breached the contract. However, in its brief in support of its motion for summary disposition plaintiff asserted that it was undisputed that “[a]fter the design bidding phases were complete, the Defendant continued to act as agent for the University” Plaintiff cannot now assert that defendant was not MSU’s agent. “[A] party may not seek redress on appeal on the basis of a position contrary to that it took in the proceedings under review.” *Flint City Council v Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002).

Plaintiff also claims that defendant’s liability is not entirely dependent on MSU’s culpability in the prior action, and that therefore, the *Bigelow* exception does not apply. Although plaintiff does not seek to hold defendant liable for MSU’s conduct, the reason for MSU’s “exoneration” in the prior action—that plaintiff’s conduct justified terminating plaintiff’s employment—supports applying nonmutual estoppel here. In other words, plaintiff’s conduct, which was conclusively found to be just cause for termination in the trial court and in this Court, see n 1, *supra*, provides an equally sufficient defense for defendant in the instant matter as it did for MSU in the prior suit.

Deciding whether to apply collateral estoppel where mutuality is lacking depends on consideration of two factors: (1) whether “the party seeking to assert [collateral estoppel] is doing so offensively or defensively”; and (2) whether “the one against whom collateral estoppel is asserted had an opportunity to litigate the issue in the previous suit.” *Braxton, supra* at 722-723. Since defendant seeks to use collateral estoppel defensively, and plaintiff had the opportunity to litigate the issue—whether just cause for termination existed—in the prior suit, defendant’s assertion of collateral estoppel here meets both criteria. Thus, applying collateral estoppel to the facts here “meets the doctrinal goal of preventing ‘multiple litigation, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication.’” *Keywell, supra* at 348.

Our application of collateral estoppel in this case is analogous to its application by this Court in *Alterman v Provizer, Eisenberg, Lichtenstein Pearlman, PC*, 195 Mich App 422, 425-427; 491 NW2d 868 (1992). In that case, this Court held that nonmutual collateral estoppel precluded the plaintiff’s professional malpractice action against his attorney when the crux of the plaintiff’s malpractice claim—that he was incompetent when he executed a settlement agreement in the underlying proceeding—had been decided against him by the trial court in its ruling on his motion to set aside the settlement agreement. As we did in *Alterman, supra*, we conclude that although the facts in this case do not squarely fit within the *Bigelow* exception to the mutuality requirement, nonmutual estoppel is appropriate in this situation. See also *Keywell & Rosenfeld, supra* at 347-350 (discussing the relaxation of the mutuality requirement in various situations).

Plaintiff also argues that collateral estoppel does not bar this action because the issues in this case were not litigated in the prior action. Again, we disagree. Although the trial court in plaintiff’s suit against MSU did not address whether defendant had independently determined that sufficient cause existed to terminate plaintiff’s employment, the trial court did determine, based on the testimonial evidence presented and independent of defendant’s letter certifying plaintiff’s termination, that MSU had sufficient cause to terminate the contract. Whether MSU had just cause to terminate the contract is the ultimate issue in this case. Even if plaintiff could prove that defendant failed to undertake an independent investigation to determine whether sufficient cause for termination existed, if sufficient cause to terminate did exist, plaintiff did not

suffer any damages as a result of defendant's conduct. A prima facie case of negligence requires proof of damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Therefore, a critical element in plaintiff's claim was an issue decided in the prior action to plaintiff's detriment, and collateral estoppel bars plaintiff's claim.

Finally, plaintiff contends that it is entitled to summary disposition on the liability portion of its claims for professional malpractice, gross negligence, and tortious interference. We disagree. Because plaintiff's professional malpractice claim and gross negligence claim are barred, the trial court properly denied plaintiff's motion for summary disposition concerning Counts I and II of plaintiff's complaint. Regarding plaintiff's tortious interference claim, plaintiff fails to argue that the trial court improperly granted summary disposition to defendant on this issue. Additionally, plaintiff fails to provide any legal or factual support for its claim that defendant tortiously interfered with its contract, other than a conclusory statement that summary disposition is appropriate because summary disposition in defendant's favor on counts I and II was inappropriate. This Court will not search for authority to support plaintiff's position, *Staff v Marder*, 242 Mich App 521, 529; 619 NW2d 57 (2000).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder